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CITATIONS

536885—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 78

FINCK CIGAR CO., INC., PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 94–97) is reported at 134 F. 2d 261. The findings of fact and decision of the United States Processing Tax Board of Review (R. 19–22) are not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 5, 1943 (R. 97). The petition for a writ of certiorari was filed June 1, 1943.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the taxpayer proved that it bore the burden of processing taxes paid under the Agricultural Adjustment Act.

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.
>
> No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided under section 906, as the case may be—
>
> (a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in

the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (U. S. C., Title 7, Sec. 644.)

SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the

average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

* * * * *

(U. S. C., Title 7, Sec. 649.)

STATEMENT

Taxpayer, a Texas corporation with its principal place of business at San Antonio, Texas, was engaged in the business of processing tobacco into cigars, and during the period from October 1, 1933, to May 1935, both inclusive, it paid processing taxes under the Agricultural Adjustment Act in the aggregate sum of $20,126.25 upon the processing of such tobacco. Taxpayer duly filed a claim for refund of the full amount of processing taxes thus paid by it which was disallowed by the Commissioner of Internal Revenue. The taxpayer thereupon appealed to the United States Processing Tax Board of Review (since abolished by Section 510 of the Revenue Act of 1942) and the claim was tried before that Board on its merits. (R. 19–20.)

The Processing Tax Board of Review found that during the tax period the taxpayer manufactured eight or ten brands of cigars, and during that period the taxpayer's sales price remained the same as theretofore for all brands except two.

With respect to these two brands prices were increased from $38.50 per thousand to $40 per thousand. The sale of these two brands of cigars amounted to approximately 60 percent of the sales of all brands of cigars. The sales prices of the two brands were increased because of the increased cost of labor and the increased cost of material, and further to meet the current prices of popular brands. The taxpayer was still selling these two brands at the increased prices on June 18, 1941. (R. 20.)

The Board of Review further found that the taxpayer's statutory margin per unit of commodity processed for the period before and after the tax was $1.7612 per pound and that its statutory margin per unit of commodity processed during the tax period was $1.7973 per pound (R. 21). The Board also found as a fact that no part of the burden of the processing tax paid by the taxpayer under the Agricultural Adjustment Act was borne by it but that such burden was shifted to others in its entirety (R. 21).

ARGUMENT

This is a fact case. Section 902 of the Revenue Act of 1936 provides that no refund shall be made or allowed of any amount paid as tax under the Agricultural Adjustment Act, c. 25, 48 Stat. 31, unless the claimant proves that he bore the burden thereof. In aid of the proof of this fact, Section

907 (a) provides that if the average margin per unit of commodity processed was lower during the tax period than the average margin during the period before and after, it shall be *prima facie* evidence that the taxpayer bore the burden of the tax to that extent. On the other hand, if the average margin during the tax period was not lower, it shall be *prima facie* evidence that none of the burden of the tax was borne by the claimant. Other provisions of the section prescribe the method for computing such margins.

The Board of Review found that the taxpayer's margin per pound of tobacco processed during the tax period was higher than its margin per pound of tobacco processed during the period before and after the tax, thus creating a presumption that the tax burden was not borne by the taxpayer. The proof offered by the taxpayer to overcome the presumption created by the comparison of margins was inadequate to prove that the taxpayer bore the burden of any part of the amount sued for.

The decision of the Board of Review and the court below are based upon failure of proof. The only question involved is whether the finding that the taxpayer did not bear any part of the tax burden is sustained by the evidence. The taxpayer suggests (Pet. 3) that the Board's conclusion is contrary to "its findings with respect to

increased costs of labor and material." Even if this inference were justified, it would not constitute ground for granting certiorari. However, there is no merit to the point. The Board did not make any direct finding with respect to increased costs, other than the processing tax. It merely found that the prices of two brands of cigars were increased "because of the increased cost of labor and the increased cost of material, and further to meet the current prices of popular brands" (R. 20). But the evidence, which consisted of estimates and approximations unsupported by any book records, was too indefinite to permit any finding with respect to the effect of any increase in costs of labor and material upon the taxpayer's margin for the tax period. This insufficiency in the proof is emphasized by the court below (R. 96–97).

The taxpayer bases its petition for a writ of certiorari on an alleged conflict (Pet. 3) with *C. B. Cones & Son. Mfg. Co.* v. *United States,* 123 F. 2d 530 (C. C. A. 7). But there is no conflict. The latter case, like the instant case, is a fact case, and the decision was based upon the evidence. Further, the *Cones* case involved an amount paid as floor-stocks tax under the Agricultural Adjustment Act, whereas the instant case involves a claim for refund of amounts paid as processing tax. Section 907 (a) of the 1936 Act is inapplicable to claims for refund of floor-stocks taxes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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